

The Honorable Ricardo S. Martinez

UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

UNITED STATES OF AMERICA,  
Plaintiff,  
v.  
EDWARD KOGAN,  
Defendant.

| NO. CR18-258RSM

## **DEFENDANT EDWARD KOGAN'S SENTENCING MEMORANDUM**

Sentencing Hearing: August 2, 2019,  
9:00 A.M.

COMES NOW the Defendant, EDWARD KOGAN, by and through his undersigned counsel and respectfully submits this Sentencing Memorandum in support of his request for a sentence below the guideline range that is “sufficient, but not greater than necessary, to comply with the purposes set forth” in 18 U.S.C. § 3553(a).

## I. INTRODUCTION

Edward Kogan is before this Court for sentencing having pleaded guilty on December 4, 2018, to one count of Conspiracy to Commit Computer Hacking in violation of 18 U.S.C. § 371.

1 Sentencing is scheduled for August 2, 2019, at 9:00 a.m. before The Honorable  
 2 Ricardo S. Martinez, Chief United States District Judge. The Government is represented  
 3 by Steven Masada, Assistant United States Attorney. Mr. Kogan is represented by David  
 4 Seltzer and Robert Flennaugh II. The probation officer is Andrea G. Porter.

5 **II. MR. KOGAN**

6 Mr. Kogan is a 30-year-old, first-time, non-violent offender. He is a hard-working  
 7 individual with a passion for computers; he is reserved in nature and keeps to himself. As  
 8 a teenager Mr. Kogan became interested in computer programming, and subsequently  
 9 discovered the technology's ability to allow for self-expression and facilitate  
 10 communication. His passion for computers led Mr. Kogan to search for others who shared  
 11 this same passion, which led him to communicate and trust the co-conspirators in this case.  
 12 Believing that he was viewing information in the public domain, Mr. Kogan used an  
 13 application developed by a co-conspirator to run queries to view products being developed  
 14 by Microsoft. He is an individual who understands the notion of what taking responsibility  
 15 for one's actions, and he has done everything one could to conserve the government's  
 16 resources.

17 **III. SENTENCING FACTORS**

18 As the Court is well aware, district courts are free from the mandatory nature of the  
 19 Federal Sentencing Guidelines. United States v. Booker, 543 U.S. 220 (2005). A District  
 20 Court is required to impose a reasonable sentence based upon factors set forth in 18 U.S.C.  
 21 §3553(a).

A District Court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range...[t]he Guidelines are not the only consideration, however. Accordingly, after giving both parties an opportunity to argue for whatever sentence they deem appropriate, the district judge should then consider all of the 3553(a) factors to determine whether they support the sentence requested by a party. In so doing, he may not presume that the Guidelines range is reasonable. He must make an individualized assessment based on the facts presented.

Gall v. United States, 552 U.S. 38, 49 (2007).

Accordingly, the Guidelines are one, and only one, of the factors to be considered by the District Court which must, after considering all the sentencing factors, “tailor the sentence in light of other statutory concerns.” Peugh v. United States, 569 U.S. 530, 537 (2013). Title 18 U.S.C. §3553 (a) sets forth a list of at least ten (10) separate sentencing factors which this Court is required to consider in fashioning a sentence which is “sufficient, but not greater than necessary, to comply with the purposes” set forth in the Act. This Court must fashion a sentence which:

- (A) reflects the seriousness of the offense, promotes respect for the law, and provides just punishment for the offense;
- (B) provides adequate deterrence to criminal conduct;
- (C) protects the public from future crimes of the defendant; and
- (D) provides the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

18 U.S.C. § 3553(a) (2) (A)-(D).

1        “The Guidelines are not only *not mandatory* on sentencing courts; they are also not  
 2 to be *presumed* reasonable.” Nelson v United States, 555 US 350, 352 (2009). The Supreme  
 3 Court has made it clear that a District Court’s exclusive reliance on a Sentencing  
 4 Guidelines calculation is erroneous. While the Sentencing Guidelines offer a good starting  
 5 point, the ultimate sentence must be based on the statutory criteria in Section 3553(a), and  
 6 the district court must explain what weight is being given to the statutory criteria at the  
 7 time it imposes a sentence. See Gall, 552 U.S. 38, 49 (2007).

8

9

10      **A. Cooperation with the United States Government**

11        “[A] sentencing court has the power to consider a defendant's cooperation under 18  
 12 U.S.C.S. § 3553(a), irrespective of whether the Government files a § 5K1.1 motion...a  
 13 sentencing court's failure to recognize its discretion to consider a defendant's cooperation  
 14 under § 3553(a)(1) is a significant procedural error.” United States v. Robinson, 741 F.3d  
 15 588, 599 (5th Cir. 2014); See also United States v. Zolp, 479 F.3d 715, 722 (9th Cir. 2007);  
 16 United States v. Landrón-Class, 696 F.3d 62 (1st Cir. 2012); United States v. Massey, 663  
 17 F.3d 852 (6th Cir. 2011); United States v. Leiskunas, 656 F.3d 732 (7th Cir. 2011); United  
 18 States v. Doe, 398 F.3d 1254 (10th Cir. 2005).

19        “Section 3553(a)(1) contains broad language instructing the court to consider ‘the  
 20 nature and circumstances of the offense and the history and characteristics of the  
 21 defendant,’ language that encompasses assistance provided by a defendant. A defendant's  
 22 assistance to the government is also relevant to the factors delineated in § 3553(a)(2),  
 23 particularly the need for the sentence to promote respect for the law and to provide just  
 24

1 punishment, to afford adequate deterrence, and to protect the public.” Doe, 398 F.3d at  
 2 1260 (internal citations omitted).  
 3

4 Mr. Kogan has taken steps to minimize the impact of his offense and minimize the  
 5 use of the Government’s resources. He has continued to assist the Government in their  
 6 investigation of the other co-conspirators and has been ready, willing, and able to testify at  
 7 trial in the United States and/or abroad if needed. Mr. Kogan’s cooperation speaks volumes  
 8 as to his respect for the law and need for deterrence.  
 9

10 **B. Just Punishment / Respect for the Law / Disparate Sentencing**  
 11

12 Mr. Kogan is ashamed to be in this courtroom. He is ashamed that his naivety  
 13 clouded his judgment. As a professional working in the programming industry, Mr. Kogan  
 14 is aware of the seriousness of his actions. He has learned an invaluable lesson; this has been  
 15 a monumental reality check.  
 16

17 **C. Need for Deterrence**  
 18

19 The sentence must serve a deterrent function, but a guidelines range would not do  
 20 so under the current facts and circumstances of this matter. Research has consistently  
 21 shown that “increases in severity of punishments do not yield significant (if any) marginal  
 22 deterrent effects.” See Michael Tonry, Purposes and Functions of Sentencing, 34 Crime &  
 23 Just. 1, 28 (2006). “Three National Academy of Science panels. . . reached that conclusion,  
 24 as has every major survey of the evidence.” Id; see also Zvi D. Gabbay, Exploring the  
 25 Limits of the Restorative Justice Paradigm: Restorative Justice and White-Collar Crime, 8  
 26 Cardozo J. Conflict Resol. 421, 447-48 (2007) (“[C]ertainty of punishment is empirically  
 27

1 known to be a far better deterrent than its severity.”) (hereinafter “Restorative Justice and  
 2 White-Collar Crime”).  
 3

4 “One of the greatest curbs on crimes is not the cruelty of punishments, but  
 5 their infallibility...The certainty of a punishment, even if it be moderate, will  
 6 always make a stronger impression than the fear of another which is more  
 7 terrible but combined with the hope of impunity; even the least evils, when  
 8 they are certain, always terrify men's minds.”

9 Centennial Symposium: A Century Of Criminal Justice: I. Crimes And Punishment: Show  
 10 Much Do We Really Know About Criminal Deterrence?, 100 J. Crim. L. & Criminology  
 11 765, 769 (2010).

12 Mr. Kogan is distraught over the situation he is in, and deeply remorseful. The daily  
 13 effect of knowing that he has done something that will shame his family is a punishment  
 14 deeper and more painful than any he has ever experienced. While this alone is enough to  
 15 significantly deter Mr. Kogan from any future criminal conduct, it is also worth noting that  
 16 despite having the technical abilities to commit similar acts Mr. Kogan has no prior  
 17 criminal history. To be sure, Mr. Kogan is aware that this is a serious offense and he does  
 18 not take this lightly.

#### 21                   **IV. OTHER FACTORS / DOWNWARD DEPARTURE**

##### 22                   **A. Sincere Remorse and Acceptance of Responsibility**

23 Not only did Mr. Kogan accept responsibility for his actions immediately,  
 24 qualifying him for a three-level reduction in the offense level, he also expressed  
 25 exceptional remorse and limited government and court resources. Mr. Kogan has  
 26 voluntarily assisted authorities in the investigation or prosecution of his own misconduct  
 27  
 28

1 by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting  
 2 the Government to avoid preparing for trial and permitting the Government and the Court  
 3 to allocate their resources efficiently.

5 In addition, Courts have authorized downward departures for exceptional “remorse”  
 6 and acceptance of responsibility, and such a departure would be consistent with these facts.  
 7

8 United States v. Fagan, 162 F.3d 1280, 1284-1285 (10th Cir. 1998); United States v. Evans,  
 9 49 F.3d 109 (3d Cir. 1995); United States v. Carter, 122 F.3d 469, 475-76 (7th Cir. 1997);  
 10 United States v. Jaroszenko, 92 F.3d 486, 490-91 (7th Cir. 1996). In Koon v. United States,  
 11 518 U.S. 81 (1996), the Supreme Court explained that a sentencing court considering  
 12 whether to depart from the applicable guidelines range “must determine whether the  
 13 ground on which it is contemplating a departure is forbidden, encouraged, or discouraged  
 14 by the Guidelines.” United States v. Parish, 308 F.3d 1025, 1029 (9th Cir. 2002). “If a  
 15 factor is discouraged, or encouraged but already taken into account, the district court may  
 16 depart only if the factor is present to an exceptional degree or in some other way makes the  
 17 case different from the ordinary case where the factor is present.” *Id.*; Fagan, 162 F.3d at  
 18 1284; United States v. Carter, 122 F.3d 469, 475-76 (7th Cir. 1997) (finding no error in  
 19 district court’s ruling that, although defendant’s remorse had been recognized when his  
 20 sentence was reduced for acceptance of responsibility, it could have departed further if it  
 21 had found his remorse to be exceptional).

22 Mr. Kogan has accepted responsibility for his actions and his remorse is exceptional.  
 23 Because of Mr. Kogan’s stoic and reserved nature, the intense shame and sorrow that he  
 24

1 lives with each and every day is not always visible and able to be fully appreciated from  
 2 the outside looking in. However, Mr. Kogan has, and will again, express to this Court that  
 3 he is ashamed that his naivety led him to communicate with and trust the wrong group of  
 4 people.

6       **B. Aberrant Behavior**

7       Mr. Kogan is entitled to a departure under § 5K2.20. Application Note 3 provides  
 8 circumstances that the Court may consider in making this determination:

10      In determining whether the court should depart under this policy statement,  
 11     the court may consider the defendant's (A) mental and emotional conditions;  
 12     (B) employment record; (C) record of prior good works; (D) motivation for  
 committing the offense; and (E) efforts to mitigate the effects of the offense.

13      U.S.S.G. § 5K2.20. This list is not exhaustive. *See United States v. Booee*, 252 F. Supp. 2d  
 14     584 (E.D. Tenn. 2003). "A defendant's conduct is aberrant behavior if that conduct  
 15     constitutes a single criminal occurrence or single criminal transaction that (A) was  
 16     committed without significant planning; (B) was of limited duration; and (C) represents a  
 17     marked deviation by the defendant from an otherwise law-abiding life." *United States v.*  
 18     *Guerrero*, 333 F.3d 1078, 1081 (9th Cir. 2003) (quoting U.S.S.G. § 5K2.20(b)). The  
 19     Defendant meets the criteria set forth in § 5K2.20 and a downward departure under §  
 20     5K2.20 is warranted in this "exceptional" case.

21      Mr. Kogan is a first-time offender who committed a thoughtless act based on the  
 22     misguided trust of others. He did not "significantly plan" the unlawful activity and it was  
 23     not an elaborate scheme on his part. What Mr. Kogan did was click on an application,  
 24     which was created by a co-conspirator, that ran a code to run queries. His motivation for

his actions was purely out of curiosity; there was no malicious intent to steal or infringe on property. This conduct is a marked deviation from his otherwise pristine life; Mr. Kogan has the technical abilities to commit similar acts but has not because he does not, and has never had, the desire to commit any crimes. Mr. Kogan has enjoyed a successful career in programming, and once he became aware of the true scope of his actions, he took steps to mitigate the effects of his offense by working and cooperating with the Government. The Defendant is a category I criminal history.

## V. CONCLUSION

In light of the foregoing facts and circumstances it is respectfully requested that this Court consider a departure and/or variance from the guidelines, a sentence that is sufficient but not greater than necessary to achieve justice. Counsel and Mr. Kogan respectfully request that this honorable Court adopt the sentencing recommendation by the United States Probation Office of three years' probation for the reasons outlined in this memorandum, the USPO's sentencing recommendation, and those additional arguments to be proffered before this Court prior to imposition of sentence.

## CERTIFICATE OF SERVICE

I hereby certify that on July 27, 2019, I electronically filed the foregoing with the Clerk of the Court using CM/ECF.

Respectfully submitted,

By: /s/ David Seltzer  
DAVID SELTZER  
Attorney for the Defendant

1 Florida Bar #782041  
2 10750 NW 6th Court  
3 Miami, Florida 33168  
4 Tel: 305.444.1565  
Fax: 305.444.1665

5 (s) Robert Flennaugh II  
6

Robert Flennaugh II, WSBA # 26764  
7 Attorney for Defendant Kogan  
Law Office of Robert Flennaugh II, PLLC  
8 810 3<sup>rd</sup> Avenue, Suite 500  
Seattle, WA 98104  
Phone: 206-447-7422  
Fax: 206-447-7534